(4)

No. 91-545



# In The
# Supreme Court of the United States

**October Term, 1991**

BURLINGTON NORTHERN RAILROAD COMPANY,
*Petitioner,*

v.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION; BLACKFEET TRIBAL BUSINESS COUNCIL; BLACKFEET TAX ADMINISTRATION DIVISION; EARL OLD PERSON, CHAIRMAN; ARCHIE ST. GODDARD, VICE CHAIRMAN; MARVIN WEATHERWAX, SECRETARY; ELOUISE C. COBELL, TREASURER; *et al.*,
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF OF *AMICI CURIAE* STATES OF MONTANA, CALIFORNIA, NORTH DAKOTA, SOUTH DAKOTA, WASHINGTON AND UTAH IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The States of Montana, California, North Dakota, South Dakota, and Utah, through their respective Attorneys General, respectfully submit a brief *amicus curiae* pursuant to S. Ct. R. 37.5.

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## INTEREST OF *AMICI CURIAE* STATES

No area of Indian law has received more attention from the Court during the last 25 years than the authority of states and tribes to tax transactions occurring in Indian country. Whether the issue has been the taxing power of a state[1] or a tribe,[2] this area has proved "vexing."

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[1]*Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905 (1991) (cigarette tax imposed on nonmember consumers); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (oil and gas tax imposed on nonmember lessee of tribe); *California State Bd. of Equal. v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985) (per curiam) (cigarette tax imposed on nonmember consumers); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) (oil and gas taxes imposed on tribal royalty share); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982) (gross receipts tax imposed on nonmember contractor of tribal school board); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980) (transaction privilege tax imposed on off-reservation retailer selling items to tribal corporation for on-reservation use); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (motor carrier license and use fuel taxes imposed on nonmember contractor of tribal corporation); *Washington v. Confederated Tribes of Colville Indian Res.*, 447 U.S. 134, 154-59 (1980) (cigarette taxes imposed on nonmember consumers); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (personal property tax imposed on tribal member); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (personal property tax and vender license fee imposed on indians; cigarette sales tax imposed on non-Indian consumers); *McClanahan v. Arizona State Tax*

*(continued...)*

*Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 138 (1980). The *amici* States have an obvious sovereign and fiscal interest when their own tax laws are at stake, but they also have an interest when tribal taxes are imposed on property or transactions simultaneously taxed under state law.[3] Equally, if not more, important to the *amici* is the need to develop coherent principles for determining the scope of inherent tribal authority in taxation and other civil regulatory matters, since the extent of such authority can affect state

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[1](...continued)
*Comm'n*, 411 U.S. 164 (1973) (income tax imposed on tribal member's reservation-based earnings); *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685 (1965) (gross income tax imposed on nonmember reservation retailer); *see also Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (gross receipts and use taxes imposed on off-reservation tribal ski resort).

[2]*Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985) (two business taxes imposed on nonmember corporation by a tribe not chartered under the Indian Reorganization Act); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (severance tax imposed on nonmember oil and gas lessee of tribe); *Colville*, 447 U.S. at 152-54 (cigarette taxes imposed on nonmember consumers).

[3]Concurrent, or "double," taxation is viewed by some in the public as unfair and a potential disincentive to reservation economic development. *See Northern Border Pipeline Co. v. State*, 722 P.2d 829, 837-38 (Mont. 1989) (Weber, J., specially concurring). *Northern Border Pipeline* upheld imposition of Montana *ad valorem* taxes against a utility's property simultaneously subject to the Assiniboine and Sioux Tribes' taxation ordinance at issue here. A comparable challenge by another utility was made with respect to property subject to the Blackfeet Tribe's taxation ordinance, was rejected by the state district court, and was not pursued on appeal. *Conoco Pipe Line Co. v. State*, No. DC-88-011 (Mont. 9th Jud. Dist., Glacier County).

regulatory jurisdiction in Indian country. *See Rice v. Rehner*, 463 U.S. 713, 719-20 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980). The present petition presents a valuable opportunity to continue the process, begun by the Court's modern decisions in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), of defining the inherent governmental authority of tribes over nonmembers.

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## SUMMARY OF ARGUMENT

Justice Johnson, concurring in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1809), stated that "[a]ll the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves." This statement reflected the unique status of Indian tribes as "domestic dependent nations" (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)) and foreshadowed modern decisional principles governing determination of what inherent regulatory authority is retained by them. The watershed case for those principles is *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), where the Court held tribes without authority to prosecute non-Indians for reservation-based offenses. Since *Oliphant*, the Court has rendered seven opinions[4]

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[4]*Duro v. Reina*, 110 S. Ct. 2053 (1990) (tribes lack inherent authority to prosecute nonmember Indians); *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989) (tribes lack zoning authority with respect to nonmember lands in "open" area of their reservation but possess such authority (continued...)

concerned wholly or partly with the extent of retained inherent tribal authority, and it can fairly be said that the controlling doctrine is still unclear. Based upon the plurality opinion in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), however, one can say what that doctrine should be: Tribes lack inherent regulatory authority over nonmembers, at least for taxation purposes, unless the latter have either expressly or impliedly consented to tribal governance.

The Court of Appeals' decision below will likely add to the doctrinal confusion attendant to determining the scope of inherent tribal authority generally and, more specifically, with respect to taxation issues. It thus deemed consent irrelevant to the necessary inquiry and, instead, posed as the dispositive inquiry "whether [petitioner] receives benefits from the Tribes for which it may be taxed." *Burlington Northern Railroad Company v. Blackfeet*

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[4](...continued)
as to nonmember lands in "closed" area); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985) (tribe possessed inherent authority to impose business taxes on nonmember corporation); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tribe possessed inherent authority to impose severance tax on nonmember oil and gas producer-lessee); *Montana v. United States*, 450 U.S. 544 (1981) (tribe lacked inherent authority to regulate nonmember hunting and fishing occurring on nonmember lands); *Washington v. Confederated Tribes of Colville Indian Res.*, 447 U.S. 134 (1980) (tribes possessed inherent authority to impose cigarette taxes on nonmember consumers); *United States v. Wheeler*, 435 U.S. 313 (1978) (tribal criminal prosecution of member for reservation offense constituted exercise of retained inherent authority, not congressionally-delegated authority, and therefore did not preclude the federal government under the Double Jeopardy Clause from prosecuting member for same conduct).

*Tribe*, 924 F.2d 899, 904 (9th Cir. 1991); Pet. 1a, 11a. Although nominally predicated on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Court of Appeals' reasoning not only departs from the very logic of that case but also ignores the significance of other decisions by this Court exploring the limits of retained tribal authority over nonmembers. The questions presented here accordingly invite the Court to refine further the standards by which lower courts should measure the reach of inherent tribal powers and to make explicit what is now implicit -- that those standards apply regardless of the particular regulatory context at hand.

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## ARGUMENT

1. The question of inherent tribal authority over nonmembers has arisen in three broad contexts: criminal jurisdiction, taxation jurisdiction, and general civil regulatory jurisdiction. Despite the differing nature of the involved regulation, however, the doctrinal standards informing the analysis in each context have been largely common. The precise nature of those standards nonetheless remains in doubt although, viewed as a whole, the court's reasoning indicates that inherent tribal authority over nonmembers for taxation purposes is rooted in the express or implied consent of the latter.

(a) In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court refused to find inherent tribal authority to prosecute two non-Indians charged with misdemeanor violations in tribal court. Rejecting the tribe's claim that the prosecutions were an appropriate exercise of its "'retained inherent powers of government'" (*id.* at 196), the Court gave "considerable weight" to "the commonly shared presumption of Congress, the Executive

Branch, and lower courts that tribal courts do not have the power to try non-Indians" (*id.* at 205) and reasoned "tribes are prohibited from exercising both those powers that are expressly terminated by Congress and those powers '*inconsistent with their status[]*'" (*id.* at 208) (emphasis in original). The Court viewed the exercise of criminal jurisdiction over non-Indians as inconsistent with the United States' "solicitude that its citizens be protected ... from unwarranted intrusions on their personal liberty" and concluded that, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes ... necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210. Shortly after *Oliphant*, the Court decided *United States v. Wheeler*, 435 U.S. 313 (1978), holding that a tribe maintained inherent authority to prosecute members for reservation-based crimes. It stated that "[t]he areas in which ... implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe" and that "the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type [since] [they] involve only the relations among members of a tribe." *Id.* at 326. The Court therefore concluded that the tribe's prosecution did not bar the federal government from proceeding against the member on the basis of the same conduct, since the prosecutions were the acts of different sovereigns. *Id.* at 328.

The Court extended the reasoning of *Oliphant* and *Wheeler* in *Duro v. Reina*, 110 S. Ct. 2053 (1990), where it determined a tribe lacked inherent authority to prosecute nonmember Indians. It stated that "the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique

customs and social order." *Id.* at 2060. The Court nonetheless did not rely exclusively on *Oliphant* and *Wheeler* for its conclusion that nonmember Indians were situated no differently than non-Indians for criminal jurisdiction purposes, observing that "[t]he distinction between members and nonmembers and its relation to self-governance is recognized in other areas of Indian law." It then noted the statement in *Montana v. United States*, 450 U.S. 544, 565 (1981), that *Oliphant*'s "'principles ... support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe'" (110 S. Ct. at 2061) and said that, while tribal civil regulatory jurisdiction over nonmembers may sometimes be present, "this civil authority typically involves situations arising from property ownership within the reservation or 'consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements'" (*id.* (quoting from *Montana*, 450 U.S. at 565)). The reference to "property ownership within the reservation" was to *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and, presumably, to that portion of the earlier decision finding zoning authority over nonmember lands within the "closed" area of the Yakima Reservation.

(b) The Court first addressed the issue of a tribe's inherent authority to tax nonmembers in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). Several tribes there imposed a tax on cigarettes marketed through reservation retailers, whose incidence fell on the ultimate consumer. *Id.* at 144. The Court rejected the claim that the tribes lacked authority to require tax payments by nonmember consumers, stating that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is

a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id.* at 152. It thereafter quoted with approval from 55 I.D. 14, 46 (1934), for the proposition that taxation "'power may be exercised over members of the tribe *and over nonmembers*, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.'" 447 U.S. at 153 (emphasis added by Court). The Court's favorable reference to the arguably broad language of Solicitor Margold's opinion nonetheless cannot be divorced from the nature of the relationship at issue in the case -- consensual commercial transactions between tribes and nonmembers where, as a condition of buying cigarettes, the nonmembers paid a tribal tax.

Two years later in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Court upheld a tribal severance tax imposed on nonmember lessees extracting oil and gas from reservation trust lands pursuant to leases under the Omnibus Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g. The principal issue was the dissent's assertion that the sole basis for the tribe's inherent power to tax resided in its right to exclude nonmembers from tribal lands, a right the dissenting justices believed had been forfeited by entering into the lease arrangements prior to adoption of the challenged tax. *Id.* at 160, 186-87 (Stevens, J., dissenting). A majority of the Court disagreed, relying on *Colville* and several earlier cases for the proposition that

> a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may

> exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe.

*Id.* at 141-42.[5] Defining the exact scope of "tribal

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[5]The earlier cases discussed by the majority concerned the Creek and Chickasaw Tribes. In *Morris v. Hitchcock*, 194 U.S. 384 (1904), the Court upheld a Chickasaw privilege tax imposed on nonmember owners of cattle and horses grazing on trust allotment lands within the tribe's territory. The holding was predicated on various treaties pursuant to which "the Chickasaw Nation ha[d] exercised the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory." *Id.* at 389. *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), involved a Creek tax imposed upon nonmembers trading within the tribe's territory. Unlike this Court in *Morris*, the court of appeals did rely on the tribe's inherent powers as the basis for sustaining the tax:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself, or by the superior power of the republic it is taken from it.

*Id.* at 950. The court then reviewed pertinent treaties and statutes, including an 1898 act which had provided for the sale of townsites to nonmembers, and found no divestiture of this inherent power. *Id.* at 951-54. It cited favorably 23 Op. Att'y Gen. 214 (1900) which concluded that nonmembers doing business on fee lands

(continued...)

jurisdiction" was not essential in *Merrion*, since not only were the affected leases on trust property but they were also the result of consensual transactions with the tribe. *Accord Kerr-McGee Corporation v. Navajo Tribe*, 471 U.S. 195 (1985).

(c) The importance of express or implied consent as a predicate for the exercise of inherent tribal authority over nonmembers is reflected in the general civil regulatory cases: *Montana* and *Brendale*. The Court stated in *Montana*, which arose from a tribe's attempt to regulate non-Indian hunting and fishing on non-Indian fee lands, that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. It then said that, while *Oliphant* and its principles generally established

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[5](...continued)
were subject to tribal taxation since "[t]hese laws requiring a permit to reside or carry on business in the Indian country existed long before and at the time [the 1898] act was passed" and that "if any outsider saw it proper to purchase a town lot under this act of Congress, he did so with full knowledge that he could occupy it for residence or business only by permission from the Indians." *Id.* at 217. The last decision, *Maxey v. Wright*, 54 S.W. 807 (Ind. Terr.), *aff'd mem.*, 105 F. 1003 (8th Cir. 1900), was a challenge brought by various attorneys to a Creek tax imposed on nonmembers practicing law in the tribe's territory. The court sustained a demurrer to the complaint, finding that the tribe "carefully guarded" in an 1856 treaty its "sovereignty, and [its] right to admit, and consequently exclude, all white persons, except such as are named in the treaty." *Id.* at 809. *Morris* and *Maxey*, therefore, did not address the inherent authority issue, while the plaintiffs in *Buster* had knowledge of and, as reasoned in the Attorney General's opinion, impliedly consented to the business tax when they purchased their townsites.

a tribe's inherent powers did not encompass nonmember activity, there were two possible exceptions:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee*, [358 U.S. 217, 233 (1959)]; *Morris v. Hitchcock*, 194 U.S. 384; *Buster v. Wright*, 135 F. 947, 950 (CA8); see *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-54. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

*Id.* at 565-66. The Court rejected application of either exception, since "[n]on-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction"[6] and "[t]he complaint in the

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[6]The Court had earlier construed the 1868 Fort Laramie Treaty, 15 Stat. 649 (1868), as conferring on the Crow Tribe the authority to control hunting and fishing only on those lands where it "exercises 'absolute and undisturbed use and occupation.'" 450 U.S. at 559. The quantity of such lands, however, "was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887 ...

(continued...)

District Court did not allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe." *Id.* at 566.

While the absence of a majority opinion in *Brendale* reflects disagreement over the precise standards applicable to determining the extent of inherent tribal civil regulatory jurisdiction, the plurality opinion's reasoning represents what the *amici* States believe is most consistent with prior decisions. That opinion held in a zoning context that, absent consent, tribes do not possess regulatory jurisdiction over activities of nonmembers on the latter's own lands. Application of the second *Montana* exception was deemed to "make little sense" in such circumstances because tribal zoning authority "would last only so long as the threatening use continued" and "zoning authority could vest variously in the county and the Tribe, switching back and forth between the two, depending on what uses the county permitted on the fee land at issue." 492 U.S. at 429-30. The plurality opinion therefore held that "the governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land" and that, if a tribe's political integrity, economic security, or health and welfare was demonstrably imperiled by a particular use of nonmember land, the tribe should pursue available state or federal administrative and judicial remedies. *Id.* at 430-31. At least where land-use practices are involved, the *Brendale* plurality opinion indicates that tribal civil regulatory jurisdiction can be premised only on consent.

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[6](...continued)
and the Crow Allotment Act of 1920[.]" *Id.* The Court dismissed as "def[ying] common sense" any suggestion that non-Indians "who would settle upon alienated allotted lands would be subject to tribal regulatory authority." *Id.* at 560 n.9.

2. The underlying issue presented by the petition is whether the court should make clear the principle that inherent tribal authority for taxation, if not all, purposes over nonmembers must be grounded in express or implied consent. *See Duro*, 110 S. Ct. at 2064 ("With respect to [their] internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country. ... This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system") (citations omitted). The evolution of the Court's reasoning from *Oliphant* to the plurality opinion in *Brendale* suggests this conclusion is inescapable. It is nonetheless an evolution which was not appreciated by the Court of Appeals.

There is no question that the petitioner's use of the rights-of-way through the Fort Peck and Blackfeet Reservations is unrelated to any consensual relationship with either the Assiniboine and Sioux Tribes or the Blackfeet Tribe. The rights-of-way were acquired from the United States through statute and presidential directive, with the tribes explicitly agreeing that the Secretary of the Interior, not themselves, would establish "such rules, regulations, limitations, and restrictions" as necessary and the "compensation" for the land taken. Act of May 1, 1888, art. VIII, 25 Stat. 113, 115-16; Pet. 54a. Under these circumstances, the Court of Appeals' lengthy discussion concerning whether the rights-of-way "extinguish[ed] the Tribes' title" (924 F.2d at 902 n.5; Pet. 7a n.5) adds little, if anything, to the required substantive analysis since, whatever the precise nature of the tribal property interest, it is insufficient to preserve a claim to inherent regulatory jurisdiction over property whose use and control, as well as cost, for right-of-way purposes had

been expressly retained by the federal government. *Cf. Thomas v. Gay*, 169 U.S. 264, 273 (1898) (indicating by analogy that Arizona and Idaho tribes' interest in railroad rights-of-way was too insubstantial to affect territories' taxation authority).

The Court of Appeals effectively conceded the absence of a consensual basis for the Tribes' taxing authority and instead framed the question as "whether Burlington Northern receives benefits from the Tribes for which it may be taxed[,]" thereby creating a *third* exception to the presumption that tribes lack inherent regulatory power over nonmembers applicable only in taxation matters. 924 F.2d at 904; Pet. 11a.[7] In *Merrion*, the Court did state "Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services" (455 U.S. at 140), but this statement cannot be isolated from the more general proposition that "the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction" (*id.* at 142). Consequently, unless mere receipt of tribal services, whether solicited or not, constitutes entering "tribal jurisdiction," the Court of Appeals' analysis begs the question. Crediting that analysis would mean that tribes possess taxation authority over all reservation residents

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[7]Although the availability of the second *Montana* exception is problematic under the *Brendale* plurality opinion in any context, it could at most sanction regulatory jurisdiction of a nature essential to ameliorating nonmember "conduct" which "threatens or has some direct effect" on the enumerated interests. Taxing jurisdiction plainly cannot serve such a function. This conclusion is also implicit in *Montana* itself, which referred to *Colville*, *Morris* and *Buster* as representative of instances where the first, or consent, exception has been recognized. The Court of Appeals did not rely on the second exception.

since a claim can be plausibly made that, directly or indirectly, at least some minimal benefit accrues to them through tribal governmental activities. Such a broad application of the inherent authority doctrine would render tribal taxing power *sui generis* -- a result seemingly at odds with this Court's attempts to measure the reach of that doctrine against a common set of standards.

In sum, the Court of Appeals' decision presents an opportunity to define further the extent to which tribes have civil regulatory jurisdiction over nonmembers. Not only can the Court resolve the practical difficulties faced by lower courts in applying the inconsistent analytical approaches articulated in *Brendale*, but it also can clarify whether the standards ordinarily applied in determining the existence of inherent tribal authority over nonmembers extend to taxation. The questions presented by the petition thus have quite general importance to the development of coherent principles for structuring the relationships among states, tribes, and individual citizens.

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## CONCLUSION

The *amici curiae* States respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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